INDEX

CITATIONS

Cases:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 310

FEDERAL TRADE COMMISSION, *Petitioner*

v.

JANTZEN, INC.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR JANTZEN, INC.

QUESTION PRESENTED

Whether the Finality Act of 1959, which abolished the existing procedure for review and enforcement of Clayton Act cease-and-desist orders and substituted therefore a more expeditious procedure, contains not only the clearly expressed exception for review and enforcement proceedings previously initiated but also an implied exception for all orders issued before its enactment.

THE STATUTE INVOLVED

The Finality Act of 1959, Public Law 86-107, 73 Stat. 243, which repealed certain portions of Section 11 of the Clayton Act, 38 Stat. 734, now in part at 15 U.S.C. 21 (1963 ed.), is set out in full as Appendix B of petitioner's brief at pp. 34-39. Section 11 of the original Clayton Act, having been repealed on July 23, 1959, does not appear in the current edition of the U. S. Code, but it may be found at 15 U.S.C. 21 of the 1958 edition, and is set out as Appendix A to petitioner's brief at pp. 30-33.

STATEMENT

The statement of the case contained in petitioner's brief is not disputed and is adopted here with two exceptions. First, petitioner's brief (p. 2) suggests that there are generally descriptive facts in the record as to respondent's business. This is not correct.[1] Secondly, petitioner's statement of the case neglects to mention one entire chapter in the history of this proceeding—

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[1] The record contains *no* evidence of any facts about respondent or its business activities or methods other than those facts contained in a stipulation between counsel executed in November 1958 (R. 4-5), those contained in a stipulation between counsel in November, 1964 (R. 49), and those contained in an affidavit and exhibits (R. 22-36) submitted by respondent in January 1965. The record in this case contains no evidence that respondent distributes "to some 12,000 retail outlets located throughout the world", as stated by petitioner (Pet. br. 2). This was alleged in the Commission's complaint in 1958 (R. 1), but these allegations, except as to "jurisdictional facts," whatever they may be (R. 4, 7), were never admitted, denied, or established judicially or administratively in any fashion and cannot properly be relied upon now for any purpose in this proceeding. There is no way of knowing from this record, either as of today or at any date in the past, by what methods respondent's products are distributed, to whom, in what number or where.

respondent's application for informal disposition of the matter filed in January 1965, with its showing of complete current compliance with Section 2(d) of the Clayton Act. (R. 21-36).[2]

SUMMARY OF ARGUMENT

1. In 1959, after nearly forty-five years of experience with the cumbersome enforcement procedure in Section 11 of the Clayton Act, at the repeated urging of the Federal Trade Commission, Congress provided for more expeditious enforcement of orders issued under Section 11 of the Clayton Act. Congress accomplished this clearly and unambiguously in the Finality Act of 1959, which repealed the old method of procedure formerly contained in Section 11 of the Clayton Act and substituted a more expeditious enforcement procedure. Congress also provided, in Section 2 of the Finality Act, that the new procedure should "have no application to any [review or enforcement] proceeding initiated before the date of enactment of this Act" and "each such proceeding shall be governed by the pro-

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[2] At the investigational hearing in 1964, following a statement of reservations as to jurisdiction (R. 52-53), respondent attempted to offer additional facts (R. 54) to assist the Commission in exercising its discretion as to the proper disposition of the matter. Counsel for the Commission objected, and, in the interest of expediting the proceeding, respondent withdrew the offer (R. 63). Upon the matter's having been reported by the hearing examiner to the Commission, respondent filed an Application for Disposition under Section 1.21 of the Commission's General Procedures, which provides for informal non-adjudicatory disposition on the basis of voluntary compliance. Counsel for the Commission answered (R. 37-39), and on April 9, 1965, the Commission issued an Order Denying Respondent's Request For Informal Disposition without explanation (R. 39).

visions of such section as they existed on the day preceding the date of enactment of this Act."

Congress intended to provide for the more expeditious enforcement of Clayton Act cease-and-desist orders, and it did so without equivocation. Convinced of the worthlessness of the old method of enforcement, Congress abolished it except as to a limited category of cases explicitly provided for in Section 2. The Commission recognized at the time that, by Congress' inclusion of Section 2, Congress wrote off enforcement through the courts of appeals of the old orders as to which review or enforcement proceedings had not already begun. There is no basis for the Commission's current request that this Court rewrite the Finality Act to provide that the old method of procedure shall be preserved, not only as to cases in which review or enforcement proceedings had been initiated, as Congress provided, but as to *all* orders whether or not review or enforcement proceedings had been initiated at the time of the Finality Act's enactment.

2. Clayton Act enforcement will be strengthened by affirming the court of appeals' decision. The Finality Act did away with a poor method of enforcement. A clear affirmation by this Court that the court of appeals' decision is correct will free the Commission to proceed by way of the more expeditious method.

ARGUMENT

INTRODUCTION

The Federal Trade Commission seeks reversal of a unanimous decision of the Court of Appeals for the Ninth Circuit. The Commission's brief assembles a variety of artfully phrased arguments attacking the decision of the court of appeals. This effort would be

unnecessary but for a nostalgic attachment[3] to an antiquated method of procedure for which Congress in 1959 explicitly provided a better substitute.

Petitioner asks this Court, in the face of a clear and unambiguous congressional enactment to the contrary, to declare that an "unwieldy" (Pet. br. 17) and "laborious, time-consuming and very expensive" (Pet. br. 15) method of procedure shall be preserved. Petitioner would have the Court speculate about an unexpressed intention of Congress, masking a lack of evidence of any such intention by use of the words "obvious" (Pet. br. 14) and "plain" (Pet. br. 21), when the one obvious or plain thing is that the statute itself is so clear that there is no need to resort to speculation about congressional intent.

Petitioner further asks the Court (Pet. br. 22) to ignore a settled and sensible rule of statutory construction, citing no authority to support this request and providing the Court with not the slightest assistance in thinking through the possible problems which might be raised if the Court were to decide in this case that an amendment by substitution does not explicitly re-

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[3] There seems no better way to describe it. As one member of the Commission has stated: "If, as the Commission is seeking, the Supreme Court should reverse the decision of the Court of Appeals in Jantzen, the Commission would have 'won' the right to go back to the old, unsatisfactory pre-1959 enforcement procedure. As the Court of Appeals pointed out in footnote 11 of its opinion, the old procedure was characterized in the hearings before Congress as 'ineffectual; cumbersome; lacking teeth; awkward, slow, and without meaningful sanction; intolerable, laborious, time consuming, very expensive and entirely unnecessary; inadequate; ponderous; shocking; wasteful and uneconomic.'" Letter of Commissioner Elman of June 23, 1966, to Senator Sparkman, set out as Appendix A to respondent's Memorandum in Opposition.

peal that part of the statute for which the new language is to be substituted.

Furthermore, petitioner, unwilling to rely completely on its argument for *non*-repeal (having itself taken a different tack in the court below)[4] makes a 180 degree turn and argues in part II of its brief that the 1959 statute *did* repeal the old provisions but that an 1871 statute preserves jurisdiction. To accomplish this, petitioner asks this Court to adopt at least one, if not both (it is not quite clear which) of two proposed meanings for the term "liability" which strain rationality beyond the breaking point. After marching for twenty-five pages to the drums of speculative congressional intent behind a 1959 statute which is clear on its face, petitioner changes the beat and urges a completely inconsistent theory that an 1871 statute should be stretched to cover a situation which Congress in 1871 "obviously" had no intention of including. For obvious reasons, petitioner makes not even the slightest reference to congressional intent behind the 1871 statute.

We submit that petitioner has not offered any authority or any respectable theory for reversal of the carefully-reasoned opinion of the court of appeals. The Commission provides no answer to the question—"What words of what statute should be construed in what manner in order to achieve any result other than the one reached by the court of appeals?" Is the Commission suggesting that the words "amended to read as follows" should not be construed to mean "amended

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[4] "We recognize, of course, that Public Law 86-107 *repealed* the old procedures with regard to future orders, as the courts have held." Reply brief for Petitioner, p. 5 (emphasis supplied).

to read as follows"? And, if not, then what should they be construed to mean? Or is the Commission suggesting that the words in Section 2 of the Finality Act preserving the old procedures as to "any procedure initiated before the date of enactment of this act under the third or fourth paragraph of Section 11" should be construed to cover any proceedings initiated before or *after* the date of enactment of this act? Or is the Commission suggesting that some particular word or words should be inserted by this Court in Section 11 of the Clayton Act as it now reads in the U. S. Code? Or is the Commission suggesting that some word or words should be inserted by this Court in the Finality Act of 1959?[5] In any event, if the Commission wants the Clayton Act or the Finality Act rewritten, it should turn to Congress and not to the courts.

We submit that respect for law, logic, language, and good sense all require affirmance of the court of appeals' decision. Furthermore, we submit that this result is fully consistent with stated policy objectives of the Congress and this Court.

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[5] The court of appeals explicitly rejected this suggestion (R. 85). "What we are now asked to do, in substance, is to insert into section 2 of the Finality Act a provision making it applicable to outstanding cease and desist orders as to which proceedings had *not* been initiated, before the date of enactment, under the third and fourth paragraphs of the former section 11 of the Clayton Act, and this in spite of the fact that the section applies only where such proceedings *have* been initiated. Whether the omission of such a provision was intentional, as it may have been, or inadvertent, as it may also have been, is immaterial. It is not the business of courts, under the guise of construction, to put into a statute what Congress has left out. (*Hanover Bank* v. *Commissioner*, 1962, 369 U.S. 672, 677-78; *Iselin* v. *United States*, 1926, 270 U.S. 245, 251; *Elbert* v. *Poston*, 1925, 266 U.S. 548, 554.)"

I. THE COURT OF APPEALS' DISMISSAL FOR LACK OF JURISDICTION WAS CORRECT IN BOTH LAW AND POLICY

A. Repeal Is Clear on the Face of the Statute.

After careful review of the statutory language, the court of appeals concluded that "repeal in this case was express." (R. 81) The Finality Act has two sections. Section 1 provides

(a) for "redesignation" of the first and second paragraphs of Section 11 of the Clayton Act as subsections (a) and (b) of such section,

(b) that the last sentence of the second paragraph of Section 11 of the Clayton Act, which has now been redesignated as subsection (b), is "amended to read as follows" with new language to be substituted, and

(c) that the third, fourth, fifth, sixth and seventh paragraphs of the old section "are amended to read as follows" with new language for substitution as subsections (c) through (l).

Section 2 of the Finality Act provides that the amendments made by Section 1 "shall have no application to any proceeding initiated before the date of the enactment of this Act under the third [enforcement] or fourth [review] paragraph of section 11" of the 1914 Clayton Act. Section 2 provides further that "each such proceeding shall be governed by the provisions of such section as they existed on the day preceding the date of enactment of this Act."

What did Congress accomplish by the adoption of this language?

1. As to proceedings for enforcement or review initiated prior to the date of enactment of this

Act Congress stated (a) that the new method of procedure should *not* apply and (b) the old method of procedure *should* apply.[6]

2. As to review or enforcement proceedings initiated *after* the date of enactment of this Act, Congress provided the enforcement method specified in Section 1.[7]

There is no need to speculate about the intention of Congress when it adopted the Finality Act. Use of

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[6] If petitioner's argument were correct, there would be no need for the second sentence in Section 2.

[7] As to review or enforcement proceedings not initiated prior to the date of enactment of this Act, Congress *could* have left (but did not leave) to the enforcement authorities the alternatives (a) to make use of the new procedure for civil penalties, or, if they chose, (b) to continue use of the old provisions in Section 11 of the Clayton Act, in the words of Section 2 of the Finality Act, "as they existed on the day preceding the date of enactment of this Act." (This is hardly language which Congress would use if it intended that such provisions would continue in effect for any purpose other than that specifically provided.)

As to review or enforcement proceedings not initiated before the date of enactment of this Act, Congress *could* have provided a distinction between any such proceedings in connection with orders issued at any time prior to the date of enactment of the Finality Act and orders issued following the date of enactment of the Finality Act, or it *could* have provided a distinction between orders issued, say, ten years prior to the date of the enactment of the Finality Act and thereafter or even ten years subsequent to the date of enactment of the Finality Act and thereafter.

In fact, Congress did not make any such distinctions.

On page 16 of petitioner's brief there appears the following: "The Act did not, of course, provide explicitly for the 379 then-outstanding orders which had never been reviewed in courts of appeals and which, because of the absence of any limitations provisions of the 1914 Act, were still subject to judicial review." Why "of course"? If there were anything to petitioner's argument that Congress intended to retain the old procedures for their enforcement, certainly Congress could and would have said so.

the terms "redesignated," "amended to read as follows" (in two places), and reference to "the provisions of such section as they existed on the day preceding the date of enactment" all march in the direction of what the court of appeals found was the "normal rule" of statutory construction, to read such language as an express repeal of provisions omitted. We submit that this is the appropriate rule for this Court to follow.

Although petitioner attempts to belittle the reasoning of the court of appeals in following this "normal rule," characterizing the court of appeals' approach as "highly formalistic" (Pet. br. 22) and "doctrinaire" (Pet. br. 23), petitioner does not deny that the court of appeals' reading is indeed "the normal rule of statutory construction." Nor does petitioner offer even the vaguest suggestion as to an alternative rule or even an alternative reading.[8]

Petitioner's brief does attempt to bolster the unsupported argument in its final paragraph (Pet. br. 24) by suggesting that a "sensible construction of the statute, which would give true recognition to the principle that it ought not be construed so as to ascribe arbitrary motives to the legislators, would compel the

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[8] For what rule does petitioner contend? Perhaps for the rule, as suggested by Mr. Justice Stewart dissenting in *United States* v. *Von's Grocery Co.*, 384 U.S. 270, 301, that "the Government always wins." Should the rule be the opposite of that adopted by the court of appeals? What would be the result of adopting the rule contended for by petitioner? Or should there be no rule at all? What would be the result of adopting such a non-rule in cases other than the single one at bar?

Surely the burden is on petitioner to come forward with something more if it seeks reversal of the court of appeals on this point.

opposite result from that reached by the court below." Petitioner supports this splendid generality by a single specific: an alleged "arbitrary" distinction which it says would result from adoption of the court of appeals' reasoning—a distinction between pre-1959 orders which had been reviewed in the appellate courts and those which had not been reviewed.

The distinction which Congress made in Section 2 between reviewed and unreviewed orders is not "arbitrary" but sensible. Where courts' and litigants' time had already been invested in evaluation of evidence and appropriateness of the order, it is reasonable to conclude that Congress would wish to preserve the old method of enforcement, but, where there had been no such review, Congress did not preserve the old method.[9]

Furthermore, the distinction urged by petitioner may be only theoretical. Petitioner offers no reason to believe that it will seek to enforce a previously-reviewed order under old Section 11. It may be that the Commission should and will conclude that it would be more expeditious to use the new method.

If an enforcement proceeding had been initiated prior to repeal, there was good reason to continue the proceeding to its conclusion or to let stand an order of enforcement. And, if respondent did not seek review and the Commission never brought a proceeding for enforcement, it was not unreasonable to conclude that respondent had simply complied with the order. (See *New Standard Publishing Co.* v. *Federal Trade Com-*

[9] Of course, the firm which sought review and obtained reversal of the Commission's order is completely free of the old order.

mission, 194 F. 2d 181.) And it is reasonable to conclude that as to such instances Congress would see no reason to preserve the old method of enforcement.

In the Wheeler-Lea amendments, as in the Finality Act amendments, Congress explicitly provided for the distinction which petitioner (Pet. br. 25) characterizes as "arbitrary," for, as explained in the very opinion which petitioner cites,[10] the Wheeler-Lea Amendments provided that where respondent petitions for review and the court affirms, it shall issue its own order commanding obedience to the terms of the Commission's order, thus putting the respondent who seeks review in a worse position than one who does not.

Petitioner's brief argues from "obvious congressional intent" (Pet. br. 14) and "plain legislative intent" (Pet. br. 21) that Congress would not have wished to do what the Finality Act clearly did, that is, to repeal the provisions for a "laborious, time-consuming, very expensive" (Pet. br. 15), "cumbersome" (Pet. br. 9), "unwieldy" (Pet. br. 17) method of enforcement. Petitioner leans heavily on the word "strengthen" in the Senate committee report[11] and finds some inconsistency between the objectives of the Senate committee and the decision of the court of appeals. But the committee report did not state a belief that the legislation would, as argued by petitioner, strengthen Clayton Act enforcement *generally*, but that it would strengthen *the enforcement provisions*

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[10] *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 479.

[11] "The committee believes that this legislation will strengthen the enforcement provisions of section 11 of the Clayton Act and, accordingly, recommends favorable consideration of S. 726, as amended." (Pet. br. 55)

of Section 11. And the preamble of the Finality Act contains a clear statement of purpose "to amend Section 11 of the Clayton Act to provide for the more expeditious enforcement of cease-and-desist orders issued thereunder."[12]

On reading petitioner's brief, a number of questions suggest themselves, questions difficult or impossible to answer under petitioner's theory, but clearly answered by the court of appeals. For example, Section 2 describes the proceeding to which the amendments made by Section 1 shall have no application as those "initiated before the date of enactment of this Act." If, as petitioner seems to contend, the amendments of Section 1 would have had no application to the proceeding at bar anyway (a proceeding *not* initiated before the date of enactment); what possible reason was there for using this language? Petitioner's brief contains only hints of petitioner's position on this question. Petitioner states (Pet. br. 28) "the purpose of Section 2 was simply to indicate Congress' intent that the new procedures were to be prospective only."[13]

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[12] The preamble also contains the phrase "and for other purposes." One other purpose might have been to eliminate a "laborious," "time-consuming," "very expensive," cumbersome," and "unwieldy" method of procedure.

[13] Petitioner does not make clear from what point of reference in time the "prospectivity" for which it contends should begin. Petitioner refers to "pre-1959 orders" (Pet. br. 32), but it is unclear whether the reference is to the date of enactment of the Finality Act or to some other date. If petitioner is referring to the date of the Finality Act's enactment, it may have difficulty accounting for those matters which were pending before the Commission itself on July 23, 1959, and later resulted in a cease-and-desist order (or on which the Commission had only recently acted by the issuance of a cease-and-desist order but no review or enforcement proceeding had yet been initiated on the day of enactment

But if it had been Congress' intent that the procedures were to be prospective only, and if the purpose of Section 2 was "simply" to indicate this intent, Congress could simply have exempted from Section 1 all proceedings previously initiated, including those previously initiated under the third or fourth para-

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of the Finality Act), particularly in view of the Commission's News Release of July 28, 1959, set out as Appendix A to this brief.

The interpretation announced in the news release was made the basis for disposing of pending compliance investigations. For example, in one case staff counsel for the Commission moved to close the hearings on the ground that in view of the Finality Act "the Commission can on longer apply to the Court [of Appeals] for a decree of enforcement * * *"; the Commission itself terminated that investigation with a ruling that "further proceedings for enforcement of said order to cease and desist must be governed by the provisions of * * * [the Finality Act] rather than by the proceedings contemplated" at the commencement of the investigation. (Brief for Appellants, p. 4, *Federal Trade Commission* v. *Nash-Finch Co.*, 288 F.2d 407 (C.A.D.C.)).

By mid-1960 three cases turning upon the validity of the Commission's position were pending in the D. C. Circuit. (A fourth case had been dismissed by consent. *North American Philips Co.* v. *Federal Trade Commission*, No. 15374, October 30, 1959.) The Commission, joined by the Department of Justice, argued that the revised enforcement procedure applied to previously-issued orders. Relied upon were both "the plain language of the amendment" (Brief for Respondent, p. 7, *Schick Inc.* v. *Federal Trade Commission*, 288 F.2d 407)—"its plain terms" (Brief for Respondent, p. 24, *Sperry Rand Corp.* v. *Federal Trade Commission*, 288 F.2d 403)—and "the legislative history" (Brief for Appellants, p. 21), *Federal Trade Commission* v. *Nash-Finch Co.*, 288 F.2d 407).

The premise of the Government's position that Congress had intended to apply the revised procedure to old orders was that Congress had also intended to repeal the original provisions in their application to such orders. It is clear that, contemporaneously with the passage of the Finality Act, the Commission and the Department of Justice—the expert agencies entrusted with enforcement—interpreted the Act as repealing the original Clayton Act enforcement provisions as to previously-issued administrative orders (except those as to which proceedings had been initiated before the date of enactment).

graphs. But Congress excluded from the scope of Section 2 pending proceedings on complaint as to which no review or enforcement proceedings had yet been initiated.

We submit that the decision of the court of appeals satisfactorily accounts for the language of Section 2 in its use of the terms "any proceeding initiated" and "under the third or fourth paragraph", while petitioner's theory does not. It appears to be petitioner's contention that the court of appeals would have jurisdiction here *whether or not* Section 2 had been included in the Finality Act at all. Petitioner seems to argue that Section 1 did *not* repeal the old enforcement provisions. But petitioner also contends that Section 1 *did* repeal the old provisions prospectively but not retrospectively, or as to all orders issued subsequently but not previously.[14] In any event, petitioner seems to be arguing that the purpose of Section 2 was not to indicate when the old procedures did apply but "simply" to indicate (Pet. br. 28) when the new procedures did *not* apply. But if, as petitioner contends, the amendments of Section 1 do not apply to any order issued prior to the date of the Finality Act, there would have been no need to make specific provisions for continuance of the old provisions as to those proceedings previously initiated for review or enforcement. Petitioner's argument assumes that a statute which it says does not apply to *any* old orders included a specific provision in order to make it specifically inapplicable to *some* old orders.

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[14] Petitioner's brief says such "a reading" can be "supported" (br. 22). In the court of appeals petitioner argued: "We recognize, *of course*, that Public Law 86-107 *repealed the old procedures* with regard to future orders." Reply brief 5 (emphasis supplied).

B. There Is Nothing in the Legislative History Which Suggests That Congress Intended the Statute To Mean Anything Other Than What It Says—the Old Method Is Repealed Except as to a Limited Class of Cases.

We submit that no consideration of congressional intent is necessary, warranted, or of any assistance in any respect in analyzing the issues in this case in view of the clear meaning of the statute on its face. There is no reason to suppose that Congress intended anything other than what it so obviously accomplished:

(a) abolition of a cumbersome procedure with substitution of a more expeditious one, and

(b) preservation of the old procedure in a limited category of cases—those in which, by reason of the previous initiation of a review or enforcement proceeding, an investment had already been made by litigants and the courts.

The simple fact is that the legislative history does not cut one way or the other, and the obvious and plain language of the statute itself should be looked to rather than speculation about unexpressed congressional intent.[15] On a plain reading of the statute, there

[15] The Commission, which certainly followed the legislative history closely and itself participated in making much of it, upon passage of the Finality Act, concluded that the former enforcement procedure had been abolished. The court of appeals found that when the Finality Act was adopted, "the Commission strongly urged that the former enforcement procedure . . . was no longer in effect." (R. 81) As another court of appeals has recently noted, "anyone who is at all familiar with the closeness of the relationship between executive departments and Congress during the consideration by the latter of a change in a major statute administered by the former, knows that their guesses are far from uninformed" (*Morrison Milling Co.* v. *Freeman*, 365 F.2d 525, 529).

are two conceivable interpretations of the scheme of enforcement which was to follow the effective date of the amendment, either

A. (1) "finality" as to orders issued thereafter, with consequent enforcibility through suits for civil penalties in the district courts,

(2) the old method of enforcement to remain for those orders as to which review or enforcement proceedings had already been initiated, and

(3) abandonment of the old method of enforcement as to all other orders issued prior to the amendment with total reliance on the new more expeditious procedure

or

B. (1) "finality" as to all orders, old and new, ever issued under the Clayton Act,[16] except

(2) the old method of enforcement to remain for those orders as to which enforcement proceedings had already been initiated.

Either of these schemes would have made a sensible improvement and would have provided, in the words of the preamble, "for the more expeditious enforcement of cease-and-desist orders" issued under Section 11 of the Clayton Act. The Court of Appeals for the Ninth Circuit chose "A" above. Petitioner argues, albeit not very consistently, not for "B", which it pre-

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[16] The Wheeler-Lea amendments of 1938 to the Federal Trade Commission Act provided for just this explicitly with respect to Federal Trade Commission Act orders. The Finality Act of 1959 conspicuously omitted such provisions.

viously sought in the D.C. Circuit and abandoned,[17] but for some third scheme of dual proceedings; one for old orders, another for new.

If any inquiry is made as to congressional intent, one finds that there is nothing in the legislative history to suggest that Congress intended other than to establish a single mode of enforcement for all Clayton Act orders whenever issued, rather than one method for orders issued at one time and a different method for orders issued at some other time. Although it appears that this is not now petitioner's position, it used to be. Attorneys for the Commission, joined by the Department of Justice, in their brief on appeal from a judgment of the U. S. District Court for the District of Columbia to the U. S. Court of Appeals for the District of Columbia Circuit in *Federal Trade Commission* v. *Nash-Finch Company, supra,* included the following p. 21: "We submit that both the legislative history and the language of the amendment itself point to the Congressional purpose of establishing a single mode of enforcement for all Clayton Act orders, whenever issued."

Prior to the 1959 Finality Act's adoption, as petitioner indicates (Pet. br. 11-12), Congress had had before it several bills which would have given to old orders the same finality as the amendments have given to subsequent orders.[18] These provisions paralleled the 1938 Wheeler-Lea amendments to the FTC Act. Most of the House bills included these provisions; the

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[17] Petitioner did not seek review of the D.C. Circuit cases, perhaps because Congress' failure to follow the Wheeler-Lea precedent made petitioner's position in those cases so untenable.

[18] H. R. 3402, 81st Cong., 1st Sess.; H. R. 6748, 84th Cong., 1st Sess.; H. R. 8682, 85th Cong., 2d Sess.

Senate bills[19] did not. The Senate bill was passed first, and the House accepted it. Congress may well have adopted the statute which it did adopt in order to avoid possible opposition to any bill and to insure the development of an expeditious method of procedure in the future. That Congress showed little concern for the old orders is hardly remarkable. Many, if not all, of the old orders were widely regarded as only boiler plate adoptions of statutory language;[20] many (like the one in this case) had been issued by consent without any fact-finding proceeding. And, as the Senate report shows, Congress had been led to believe that there would be no more, and probably less, difficulty for the Commission to issue a new order where called for than to enforce an old one, since Congress had been persuaded that, under the old procedure the Commission was required to "conduct three successive investigations and . . . on three successive occasions prove *violations of the law.*" (Pet. br. 53) (Emphasis supplied)

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[19] S. 2205, 84th Cong., 1st Sess.; S. 721, 85th Cong., 2d Sess.; S. 726, 86th Cong., 1st Sess. See also H. R. 13530, 85th Cong., 2d Sess; H. R. 432, 2977, and 6049, 86th Cong., 1st Sess.

[20] "Eventually, however, we believe that cumbersome Clayton Act enforcement provisions should be amended to parallel Federal Trade Commission Act procedures. This should be done when the presently exorbitant Federal Trade Commission Act penalty provisions have been reduced and the Commission makes more specific its orders, particularly in Clayton Act Section 2 cases." Report of the Attorney General's National Committee to Study the Antitrust Laws, March 31, 1955, page 374.

C. The Statute, as Written, Will Assist the Commission To Develop an Effective Enforcement Program.

Petitioner retreats substantially from the position it took before the court of appeals that, unless its views are accepted, "forty-five years of Clayton Act enforcement and almost 400 orders to cease-and-desist would be wiped from the books" and that Congress "did not intend to grant amnesty to the almost 400 law violators under order." (The court of appeals rejected these contentions on both legal and practical grounds (R. 84-85)).

Petitioner now urges this Court to rewrite an Act of Congress because, according to the petitioner, it is "improbable" (Pet. br. 21) that Congress would have wished the result reached by the court of appeals. Petitioner argues (Pet. br. 21) that the issue turns not on how substantially "the Commission's enforcement power"[21] was affected by repeal of the old enforce-

[21] An underlying assumption of the Commission's argument seems to be that by some "obvious" or "plain" intent which cannot be discussed rationally and which obscures all analysis in a fog of generality, Congress meant by the Finality Act to increase the "*power*" of the Federal Trade Commission and that since the court of appeals' decision does not clearly serve to increase the Commission's power, this must not be what Congress wanted, and, therefore, this Court should somehow rewrite the statute. This view is consistent with and springs from the view held by some that Robinson-Patman Act enforcement is a matter of the good guys against the bad guys, the cops against the robbers, the cowboys against the Indians. The bad guys are the violators and the good guys are the law enforcers. By passing the Finality Act, Congress meant to help the good guys, but the court of appeals' result might help the bad guys, and therefore, the court of appeals should be reversed.

We submit that this is not the intelligent way to look at the issue, if indeed there is one, presented by this case. For one thing, it has never been proven that this respondent ever violated the

ment provisions but "rather whether there is enough of a difference to render it improbable that Congress would have wished this result." And petitioner submits "that Congress would not have voluntarily chosen to deprive the Commission of either the psychological force which an enforcible pre-1959 order had or the reduced burden which rested on the Commission in enforcing orders rather than statutes." We submit (1) if this argument has any merit it should be directed to Congress and not to this Court; and (2) if this Court were sitting as a legislature, petitioner's argument would be unpersuasive even so.

As to the "psychological force" which a pre-1959 order might have retained if Congress had passed a different statute in contrast to that which such an order now retains, the threat of a new proceeding under the current procedure, with the possible result of an order directly and more expeditiously enforcible in district courts through civil penalty actions in which the only issues considered are whether the Commission had jurisdiction to issue the order and whether it has been violated, has as much as or more deterrent effect against future violations of the Clayton Act than the possibility of enforcement through the cumbersome

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Robinson-Patman Act prior to 1960. And the only evidence of record as to the current state of affairs is that contained in the unrebutted showing of respondent (R. 22-36) of a complete program for compliance with the law.

In providing for the more expeditious method of enforcement in the Finality Act, Congress did not necessarily intend exclusively to increase or decrease the *power* (or alternatives) of the Federal Trade Commission or to lighten or make heavier its burdens but could as well have intended to relieve both *respondents and the Commission* of the burden of a "laborious", "time consuming", "very expensive", "cumbersome" and "unwieldy" procedure.

procedure of the old statute. We submit that it is improbable that Congress would not have recognized this. Congress would not have voluntarily chosen and did not choose to preserve what one commissioner has described as "an archaic and ridiculous method of enforcement whose total demise the Commission should be the first to cheer" (Respondent's Memorandum in Opposition 9a).

As to the "reduced burden" which might have rested on the Commission in enforcing old orders rather than proceeding anew to prove a violation of the statute, we submit that there are very few such cases, if any.[22] Certainly the case at bar is not one,[23] and petitioner has done little or nothing to provide the Court with a basis for answering the question petitioner says needs to be answered—what difference does

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[22] The distinction between proving a violation of law and proving a violation of an order is a latter-day invention, apparently not suggested to Congress during its consideration of the Finality Act and apparently not taken very seriously even now. As the Senate report stated (Pet. br. 53), the old procedure required that "the Federal Trade Commission must conduct three successive investigations and must on three successive occasions prove violations *of the law.*" (Emphasis supplied) Petitioner's brief (p. 18) contains the same articulation—"a third violation *of the Act.*" (Emphasis supplied)

[23] The order (R. 16), which was issued by consent and without findings, merely repeats the statutory prohibition of Section 2(d) of the amended Clayton Act, 15 U.S.C. § 13(d). Proof of violation of the statute shows violation of the order and vice versa. The Commission would have had no greater burden in this case in July 1964 when it resolved to investigate respondent's compliance (R. 11) if it had started an entirely new proceeding rather than attempted to enforce the old order through the old method. Why petitioner chose to proceed as it did in this particular case is most difficult to understand.

it make that Congress abolished the old method.[24] We submit that the answer is that Congress wisely abandoned the old procedure and that the Commission would better promote expeditious and effective Clayton Act enforcement by doing the same.

We submit that the truly meaningful orders issued prior to 1959 have been explicitly preserved by Section 2 of the Finality Act and that it is not "improbable" (Pet. br. 21) but probable that Congress,

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[24] On p. 20, fn. 28, petitioner cites five cases. Two were affirmed in court and thus specifically preserved by Section 2 of the Finality Act. The other three were consent orders in which the proceeding before the Commission included no finding of violation.

Petitioner submits as Appendix D to its brief what purports to be a list of existing corporations against which there are outstanding pre-1959 orders. It should be pointed out that, except for FTC Docket 4571 on page 44 of petitioner's brief, the statutory subsections have not been indicated. This results in the obscuring of just how many proceedings were actually price discrimination proceedings under Section 2(a), in which petitioner contends the orders may have done something more than just repeat the statutory prohibition, and how many were brokerage proceedings under Section 2(c) or discriminatory allowance proceedings under Section 2(d), such as this case, where Commission orders merely repeat the words of the statute. For example, FTC Docket 6420 (Pet. br. 47) appears as ten Section 2 orders. In fact, a single boiler plate 2(c) consent order against unlawful brokerage is all these ten lines amount to.

Appendix D of petitioner's brief also fails to indicate the fact that consent proceedings since 1954, unlike those prior to that time, have not required any findings of fact but have included a waiver by the respondent of rights to challenge the validity of the order (R. 7). Most of the orders issued after 1954 were either by consent or have been affirmed. This is true of all but one of the orders on page 49 and all of the orders cited in fn. 28 on p. 20 of petitioner's brief.

Also, the indications of affirmance or enforcement as to Dockets 6641, 6468 and 6470 (Pet. br. 48) are simply not correct. The affirmances were in subpoena litigation. The orders were issued by consent and never reviewed.

in evaluating the compromise necessary to achieve its basic purpose of providing for the more expeditious enforcement of cease-and-desist orders issued under Section 11 of the Clayton Act, had little difficulty in abandoning the old procedure for all but that limited category of cases specifically provided.[25]

The Commission has not explored the alternatives available to it for development of an effective enforcement program.[26] It is not true, as petitioner's brief

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[25] The court of appeals went on to suggest: "All that the Commission has to do where it finds a violation of an old cease and desist order is to enter a new cease and desist order." (R. 86) Commissioner Elman writes: "What, then, would be the actual practical consequences if the Jantzen decision were accepted and followed? As I see them, they are all in the direction of facilitating prompt and effective enforcement of pre-1959 Clayton Act orders. As already indicated, the validity of these orders and their *res judicata* effect has in no way been altered or diminished. Nor has the Court of Appeals changed or increased the Commission's burden of proving a post-order violation after conducting a judicial-type hearing on that issue. Under *Jantzen* a respondent is entitled to such a hearing on that issue before a new order, final under the 1959 amendments made by the Finality Act, is entered by the Commission. But, in that respect, there is no difference from the old pre-1959 procedure, under which a respondent was also entitled to such a judicial-type hearing before a decree enforcing the order could be entered." Respondent's Memorandum in Opposition 4a. See also the Commission's recent decision in The Elmo Company, FTC Docket 5959 (November 18, 1966), setting aside a 1952 consent order pursuant to *Elmo Div. of Drive-X Co.* v. *Dixon*, 348 F. 2d 342 (1965).

[26] One member of the Commission has stated: "I believe it would be *more* easy and effective for the Commission to enforce pre-1959 Clayton Act orders under the procedure sanctioned by the Court of Appeals in the *Jantzen* case than under the old pre-1959 Clayton Act procedure." Letter of Commissioner Elman of June 23, 1966, to Senator Sparkman, set out as Appendix A to respondent's Memorandum in Opposition. The letter contains a full statement of Mr. Elman's reasons for his conclusion.

implies, that respondents to pre-1959 orders will "be free to violate the orders against them with impunity" unless the court of appeals is reversed.[27] The court stated (R. 85):

> "The Commission is indulging in hyperbole. We do not, by our holding, wipe forty-five years of Clayton Act enforcement and almost 400 orders to cease and desist from the books, nor do we grant amnesty to any law violator, much less to 400. The orders are still there, and still as valid as they ever were. Part of the Commission's function has always been to educate and to persuade. The orders, and the Commission's opinions and findings on which they are based, are just as authoritative and persuasive as they ever were. There is a presumption that people obey the law; we would suppose that it applies to obedience to FTC orders.

We submit that a declaration of this Court, in keeping with what the statute clearly states and the court of appeals has so emphatically affirmed, will not weaken Clayton Act enforcement but, by liberating the Commission from an ineffective, cumbersome, awkward, slow, laborious, time-consuming, expensive, inadequate and wasteful procedure will assist the Commission to move in the direction of using its limited resources on the more effective, less cumbersome, better procedures now provided in Section 11 of the Clayton Act.

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[27] On July 23, 1959, ten petitions to review and *one* enforcement action were pending. As of that date thirty-one orders had been affirmed and enforced; nineteen had been affirmed only.

D. 1 U.S.C. § 109 Has No Application To This Case.

Petitioner argues that the 1871 General Savings Statute preserves the authority of the courts of appeals to enforce pre-Finality Act orders.[28] Petitioner first placed some reliance on the General Savings Statute in its reply brief below. The court of appeals considered the argument and concluded that the General Savings Statute does not apply. The Court stated: (R. 86-87)

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[28] Petitioner argues (Pet. br. 26) that the construction of the court of appeals would extinguish either or both of two liabilities:

> "*First*, a liability was 'incurred' by respondent, within the meaning of the savings statute, in 1958, when it engaged in the conduct which gave rise to the Commission's complaint against it." • • •
>
> "*Second*, the 1959 consent order itself constituted a 'liability' incurred before the Finality Act was passed."

Neither of petitioner's proposed "liability" theories is acceptable, and petitioner itself recognizes this elsewhere in its brief when it describes the contempt sanction as "no more than a future possibility which applies, under the pre-1959 procedure, only to a third violation of the Act." (Pet. br. 18) We argued below that the consent order involved in this case was never enforcible, even prior to the Finality Act, since it was not issued in accordance with the statutory procedure. The court of appeals did not reach the question of the general unenforcibility of such consent orders.

In any event, Petitioner's argument is certainly misplaced in this case, since is overlooks the fact that the Commission's order of January 16, 1959 (R. 9) was issued pursuant to a stipulation which included the provision: "This agreement is for settlement purposes only and does not constitute an admission by respondent that it has violated the law as alleged in the complaint." (R. 7) Petitioner's reference (Pet. br. 26) to respondent's 1958 "conduct which gave rise to the Commission's complaint against it" has no basis in the record. It has never been established that there was any conduct which gave rise to the Commission's complaint against respondent or that, as petitioner contends, "respondent thereupon became liable to the entry of a cease-and-desist order."

"This proceeding is not based upon a violation that occurred *before* the Finality Act was adopted, but on further violations occurring *after* its adoption in 1960 and 1962. (See *FTC* v. *Ruberoid Co., supra.*) Thus there is not here involved a "penalty, forfeiture or liability" incurred under the former statute. Here, we deal with a statute which formerly conferred jurisdiction on this court, and which, except as to a limited class of cases, of which this is not one, has been repealed. *Cf. De La Rama S.S. Co.* v. *United States,* 1953, 344 U.S. 386, 390. Moreover, the violations which, had they occurred before the enactment of the new statute, were a prerequisite to our jurisdiction, are, under the new statute, the basis for a new cease and desist order, enforcible by what the Commission says is a better method. *Cf. United States* v. *Obermeier,* 2 Cir., 1950, 186 F. 2d 243, 251-55 *cert. denied,* 1951, 340 U.S. 951."

The Savings Statute was "meant to obviate mere technical abatement" such as that arising from amendment and repeal of a substantive prohibition (*Hamm* v. *Rock Hill,* 379 U.S. 306, 314; Comment, 54 Georgetown L.J. 173 (1965).[29] Unlike the Labor Board orders

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[29] *De La Rama S.S. Co.* v. *United States,* 344 U.S. 386 relied upon by the Commission (Pet. br. 28), dealt with the effect of repealing the substantive statute under which a "liability" arose and held that if the "liability" survives by reason of the Savings Statute so must the means of enforcing it. Where, as here, it is an enforcement means itself which has explicitly been repealed, the Savings Statute—which on its face relates to repeals of substantive rather than procedural provisions—has no application unless, contrary to the situation under the pre-1959 Clayton Act, susceptibility to the enforcement procedure is itself a "liability." As this Court expressly held in *De La Rama* (344 U.S. at 390):

"When the very purpose of Congress is to take away jurisdiction, of course it does not survive, even as to pending suits, unless expressly reserved. * * * If the aim is to destroy a tribunal or to take away cases from it, there is no basis for finding saving exceptions unless they are made explicit. * * *"

in the cases[20] cited by petitioner (Pet. br. 27), which involved orders primarily requiring affirmative acts like reinstating discharged employees and providing back pay,[21] the Clayton Act order against respondent was not subject to judicial enforcement proceedings until it had been violated.

The purpose of the Finality Act was to alter the enforcement procedure under the Clayton Act. The Taft-Hartley amendments, in contrast, made no change whatever in the judicial procedures available to the

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[20] These cases concerned the effect of the 1947 Taft-Hartley amendments on pending Labor Board action against acts constituting unfair labor practices under the pre-Taft-Hartley National Labor Relations Act. *National Labor Relations Board* v. *National Garment Co.*, 166 F. 2d 233 (C.A. 8), *certiorari denied*, 334 U.S. 845, and *National Labor Relations Board* v. *Mylan-Sparta Co.*, 166 F. 2d 485 (C.A. 6), were already pending in the courts of appeals on the effective date of the Taft-Hartley amendments; and a petition for certiorari to review the decree enforcing the Board's order in *National Labor Relations Board* v. *Edward G. Budd Mfg. Co.*, 169 F. 2d 571 (C.A. 6), *certiorari denied*, 335 U.S. 908, was pending in this Court when the amendments became effective. The pre-amendment orders in *National Garment*, *Mylan-Sparta*, and *Budd*, already pending in court when the Taft-Hartley Act was enacted, were held to be "liabilities" surviving the amendments by reason of the Savings Statute. There was no such ruling in *Eastern Coal Corp.* v. *National Labor Relations Board*, 176 F. 2d 131 (C.A. 4). In that case, where the Board's order was issued after the effective date of the Taft-Hartley amendments, the Court held that a "liability" within the meaning of the Savings Statute had been incurred at the time the pre-amendment statute was violated. The Board was found authorized to issue a post-amendment order directing reinstatement and back pay, although its power to issue a prospectively-operating cease-and-desist order was denied on the ground the challenged practices were no longer illegal under the statute as amended.

[21] "Liability" means "the state of being bound or obliged by law to do, pay, or make good something." Black's Law Dictionary 3d ed., p. 1102.

NLRB for the enforcement of its orders, but merely reenacted them. The post-amendment enforcement of pre-amendment NLRB orders was thus no more than an application of the traditional rule that the simultaneous repeal and reenactment of a statute does not disturb its continuity in force.

CONCLUSION

For the reasons stated in the opinion of the court of appeals (R. 76-87), in the letter of Commissioner Elman to Senator Sparkman (Appendix A to Respondent's Memorandum in Opposition), and in this brief, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX A

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OFFICE OF INFORMATION

EX 3-6800, Ext. 335

NEWS RELEASE

For IMMEDIATE Release on Tuesday, July 28, 1959.

FTC ISSUES PRESS STATEMENT ON PUBLIC LAW 86-107

The Commission today directed the issuance of the following statement relative to Public Law 86-107:

On July 23, 1959, the President signed Public Law 86-107 which amends the Clayton Act to provide for the more expeditious enforcement of orders issued under Section 11 of that Act.

Orders issued under Section 11 of the Clayton Act generally pertain to price and other discriminations among customers, arrangements whereby customers must deal exclusively in the wares of particular suppliers, corporate mergers and interlocking directorates.

The major purpose of P. L. 86-107 is to make final orders of the Interstate Commerce Commission, the Federal Communications Commission, the Civil Aeronautics Board, the Federal Reserve Board and the Federal Trade Commission issued under Section 11 of the Clayton Act in the same manner in which orders issued by the Federal Trade Commission under Section 5 of the Federal Trade Commission Act become final; that is, upon the expiration of 60 days from the date of service of the order unless petition for review has been filed in an appropriate United States Court of Appeals. The law also incorporates the penalty provisions of the Federal Trade Commission Act by pro-

viding for a civil penalty of not more than $5,000 for each violation of a commission or board order.

This change in the effectiveness and enforcement of orders issued under Section 11 of the Clayton Act does not apply to court proceedings initiated under Section 11 before the date of enactment of P.L. 86-107. Respondents to outstanding orders will have 60 days from the date of enactment, July 23, 1959, within which to petition for court review, and in the event court review proceedings are not instituted such orders will become final upon the expiration of that period.

As a convenient and practical means of giving the widest circulation to interested persons of the substance of this new law, copies of this public press release are being mailed to the last known address of individuals and corporations at present subject to orders issued under the Clayton Act.